SUPREME COURT, U. S. No. 800

Office-Supreme Court, U.S.
FILED
NOV 7 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

WORLD AIRWAYS, INC., TRANS INTERNATIONAL AIRLINES, INC., SATURN AIRWAYS, INC., PURDUE AERONAUTICS CORPORATION, CAPITOL INTERNATIONAL AIRWAYS, INC., and AMERICAN FLYERS, INC.,

Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC., TRANS WORLD AIRLINES, INC., and AMERICAN AIRLINES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RAYMOND J. RASENBERGER
Lear, Scoutt & Rasenberger
Washington, D. C.

CLAYTON L. BURWELL
Burwell, Sherman & Hansen
Washington, D. C.

LEONARD N. BEBCHICK
Bebchick & Sher
Washington, D. C.

GEORGE BERKOWITZ
New York, New York

STEPHEN D. POTTS
Shaw, Pittman, Potts,
Trowbridge & Madden
Washington, D. C.

Counsel for Petitioners

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement of Case	2
Reasons for Granting the Writ	7
Conclusion	14
Appendix A	
Opinion of the Second Circuit	1A
Appendix B	
Opinion of the District of Columbia Circuit	26A
Appendix C	
Statutes Involved	45A
Appendix D	
Judgment	47A

CITATIONS

Cases:

American Air Lines, Inc. v. *Civil Aeronautics Board*, 365 F.2d 939	6, 7
American Air Lines, Inc. v. *Civil Aeronautics Board*, 348 F.2d 349	8
C & S Airlines v. *Waterman SS Corp.*, 333 U.S. 103	2
Caledonian Airways (Prestwick) Ltd., C.A.B. Order E-25017, April 21, 1967	13
Duplex Printing Press Co. v. *Deering*, 254 U.S. 443	10

	Page
National Bus Traffic Assn. v. *United States*, 143 F. Supp. 689	8
Nicholas v. *Denver & R.G.W.R. Co.*, 195 F.2d 428	10
Reopened Transatlantic Charter Investigation, CAB Order E-24240-1, September 30, 1966	4, 5, 6
Sudflug Suddeutsche Fluggesellshaft, CAB Order E-24697, January 31, 1967	13
Supplemental Air Service Proceeding, CAB Order E-23350, March 11, 1966, Orders E-24240-2, September 30, 1966	4, 5, 6
Transatlantic Charter Investigation, CAB Orders E-20530-1, March 3, 1964	4
United Air Lines v. *Civil Aeronautics Board*, 278 F.2d 446	3
United States v. *International Union United Auto, etc. Workers*, 352 U.S. 567	10
Statutes:	
Federal Aviation Act of 1958	
§ 101 (33) (49 USC 1301 (33))	2, 7
§ 801 (49 USC 1461)	5
§ 1006 (49 USC 1486)	2, 6
Public Law 87-528 (1962), Act of July 10, 1962, 76 Stat. 143	3
Committee Reports:	
S. Rept. No. 1567, 86th Cong. 2nd Sess.	3
S. Rept. No. 688, 87th Cong. 1st Sess.	3, 4
H. Rept. No. 1177, 87th Cong. 1st Sess.	3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. ———

WORLD AIRWAYS, INC., TRANS INTERNATIONAL AIRLINES, INC., SATURN AIRWAYS, INC., PURDUE AERONAUTICS CORPORATION, CAPITOL INTERNATIONAL AIRWAYS, INC., and AMERICAN FLYERS, INC.,

Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC., TRANS WORLD AIRLINES, INC., and AMERICAN AIRLINES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, intervenors below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is not yet reported, but is printed as Appendix A to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered July 20, 1967. A timely petition for rehearing was denied on September 29, 1967. The jurisdiction of this court is invoked under Title 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Civil Aeronautics Board, in conformity with Presidential approval, may issue certificates of public convenience and necessity for overseas and foreign "supplemental air transportation" (defined by Section 101(33) of the Federal Aviation Act as "charter trips in air transportation . . . to supplement . . . scheduled service") which authorize "inclusive tour charters" as defined and limited in the orders at issue.[1]

STATUTE INVOLVED

The pertinent portions of the Federal Aviation Act of 1958 are set forth in Appendix C to this petition.

STATEMENT OF CASE

The Second Circuit and the District of Columbia Circuit have reached diametrically opposed conclusions with respect to an important question of statutory interpretation.

---

[1] Consideration of this issue of necessity invokes the threshold jurisdictional question of whether the Court below proceeded in violation of 49 U.S.C. 1486(a) as amplified by *C&S Airlines* v. *Waterman SS Corp.*, 333 U.S. 103 (1948) which precludes review of CAB Orders bearing Presidential approval. Petitioners believe that the government's consent to jurisdiction below was legally ineffective, and Petitioners intend fully to brief and argue this critical jurisdictional question which, of course, is open for determination.

The statute, PL 87-528 (1962), was the culmination of a series of proceedings by the Civil Aeronautics Board to determine the proper role for the so-called large irregular air carriers. The Board's conclusions were overturned in court,[2] and legislation was enacted.

In considering such legislation, Congress examined *de novo* the role of these carriers. It found them to be a "significant and valuable part of the nation's air transportation system."[3] It concluded, however, that the historic participation of these carriers in individually ticketed services should be terminated and that these carriers ("supplemental air carriers") should be "charter" specialists. "Supplemental air transportation" was defined as "charter trips . . .," but disagreement arose concerning whether and how to define "charter."

The Senate Committee's bill would have enacted a "common law" definition of charter with added language to the effect that services offered to individual members of the general public would not be included except in the case of "an all expense paid tour."[4] The Committee

[2] *United Air Lines* v. *CAB*, 276 F.2d 446 (D.C. Cir. 1960). A brief summary of events leading up to the legislation may be found in the report of the House Committee. H. Report 1177, 87th Cong., 1st Session (1961), pp. 7-10 (JA 1152a-1158a).

[3] S. Rept. No. 1567, 86th Cong., 2nd Sess., p. 5; H. Rept. No. 1177, 87th Cong., 1st Sess., p. 16 (JA 1135a).

[4] The Senate Committee definition was as follows:

> "'Charter service' means air transportation performed by an air carrier holding a certificate of public convenience and necessity where the entire capacity of one or more aircraft has been engaged for the movement of property on a time, mileage, or trip basis, but shall not include transportation services offered by an air carrier to individual members of the general public or performed by an air carrier under an arrangement with any person who provides or offers to provide transportation services to individual members of the general public, other than as a member of an all-expense-paid tour." S. 1969 as reported by Committee. S. Report No. 688, 87th Cong. 1st Sess., p. 1 (JA 1210a).

Report noted that all expense tour charters "conform to the traditional concept of charter" and represent "a very different sort of service from individually ticketed transportation." S.Report No. 688, 87th Cong., 1st Sess., pp. 13-14. (JA 1238a-1239a).

The House Committee did not adopt the Senate's approach. Rather it abandoned entirely the idea of enacting a specific definition of "charter." The Committee Report stated: "This is a very difficult subject and any effort to freeze a definition of charter service into law could well lead to complications." H.Rept. 1177, 87th Cong., 1st Sess., p. 11 (JA 1160a).

The Conference adopted the House Committee's version of the bill without explanation. However, at the time the Conference bill came up for action on the floor of each house a number of statements were made by members connected with the bill to the effect that all expense tour charters were not intended to be authorized.

The question of Congressional intent as to all expense tour charters (now called "inclusive tour charters") arose promptly in two proceedings conducted by the Board to consider applications to engage in supplemental air transportation. The *Supplemental Air Service Proceeding* (Docket 13795) dealt with the requirements for supplemental air transportation domestically and internationally except for transatlantic service. The *Transatlantic Charter Investigation* (Docket 11908), which had been commenced prior to the legislation,[5] became the vehicle for

[5] Because of the early popularity of transatlantic charters, the Board had determined in 1960 to consider awards for such service (JA 617a) under its basic authority to issue certificates for air transportation. In its first decision in the *Transatlantic* proceeding in 1963 the Board decided on a policy against authorizing all-expense tour charters. This aspect of the decision was, however, not passed upon by the President (who approved only a portion of the awards recommended by the Board). The issue therefore remained for reconsideration by the Board in the *Reopened Transatlantic Charter Investigation.*

determining the requirements for supplemental air transportation in that part of the world. The *Reopened Transatlantic* and *Supplemental* cases were ultimately consolidated by the Board for oral argument, which was held on October 13-14, 1965.

The Board decided the *Supplemental* case on March 11, 1966. It found, as had its Hearing Examiner, that it had the power to authorize such charters and that, considering the benefit to the public and to the supplemental carriers, and the absence of adverse effect on other carriers, it should do so at least for an experimental period of 5 years. (JA 336a et seq.). Two opinions and orders were adopted, one containing domestic authority, the other covering foreign and overseas. The opinion and order covering the domestic awards (Order E-23350, JA 332a) was made public. At the same time a new regulation (Part 378, JA 411a) was issued defining "inclusive tour charter" and setting forth detailed terms and conditions under which such charters could be operated. These provisions were designed to insure that the services being authorized were *bona fide* "charter trips."

The Board's opinion and orders in the *Supplemental* case pertaining to foreign and overseas air transportation were at the same time transmitted, without public disclosure, to the President for his approval as required by the statute. (Section 801 of the Federal Aviation Act (49 U.S.C. 1461)). These documents incorporated by reference the Board's opinion on the legal issues in the domestic order. On the same day, March 11, 1966, the Board also adopted and transmitted to the President an order in the *Reopened Transatlantic* case (Order E-24240, JA 1060a) authorizing inclusive tour charters in the transatlantic market. The Board disposed of the challenge to its power to authorize such tours by referring to its opinion in the *Supplemental* case. (JA 1077a). It also adopted the same regulation for the international

inclusive tour charters—transatlantic and other—as it had issued for the domestic charters.

On September 30, 1966, the Board's orders with respect to the *Reopened Transatlantic* case and the foreign and overseas portions of the *Supplemental* case, having been approved by the President, were issued. Orders E-24240-2 (JA 1060a) and E-24237-9 (JA 543a).

Judicial review of the Board's decision in the domestic phase of the *Supplemental* case was sought by eleven scheduled air carriers in the District of Columbia Circuit in May 1966. The sole issue concerned the agency's power to authorize inclusive tour charters as "supplemental air transportation." In an opinion of July 19, 1966, the court sustained the Board's orders. *American Airlines* v. *Civil Aeronautics Board*, 365 F.2d 939. (The full opinion is reprinted as Appendix B hereto.)

In November 1966 the petitioners below—American, Pan American, and TWA—sought to have the orders of September 30, 1966, pertaining to foreign and overseas transportation, set aside by the Second Circuit.[6] These three carriers had also been petitioners in the D. C. Circuit. The principal ground for review was the same question of statutory power raised in the D. C. Circuit. The Second Circuit, in an opinion of July 20, 1967, rejected the suggestion of the Board that it should not take jurisdiction because of *res judicata*. It addressed itself to the statutory issue and reached an opposite conclusion from that of the D. C. Circuit. Rehearing was denied on September 29, 1967.

---

[6] The jurisdiction of the Circuit Court was taken under section 1006(a) of the Federal Aviation Act, 49 U.S.C. 1486(a). That section is reproduced in Appendix C hereto.

REASONS FOR GRANTING THE WRIT

1. There is a clear conflict between the decision of the court below and the District of Columbia Circuit.

The court below described the issue before it as follows:

> "The question before us is whether the Board's statutory authority to issue certificates of public convenience and necessity for 'supplemental air transportation,' defined as 'charter trips in air transportation,' (Section 101(33) of the Act, 49 U.S.C. § 1301 (33)) includes the power to authorize inclusive tour charters." Appendix A, p. 13 A. (footnote omitted)

The D. C. Circuit opinion described the issue before it as follows:

> "It is the uncertainty over the meaning of the term 'charter trips' which prompts the necessity for interpretation of the statute, particularly as to whether such term embraces 'inclusive tour charters'." *American Airlines, Inc.* v. *C.A.B.*, 365 F.2d 939, 941 (1966) (Appendix B, p. 27 A).

Thereafter the similarity between the two opinions ends. The following is a brief description of the approach taken by each reviewing court and the agency.

The Civil Aeronautics Board found, as had its Hearing Examiner, that all-expense tour charters were required by the public and that the scheduled carriers had little incentive to operate them. It also found that such charter authority would provide badly needed economic strength to the supplemental carriers and would not have a significant adverse effect on the scheduled carriers. (E.g., JA 140a-141a).

In concluding that all-expense tour charters were "charter trips" within the meaning of the statute, the Board

relied upon holdings under the Motor Carrier Act[7] and upon a recent opinion of the D. C. Circuit dealing with the same statutory provisions. *American Airlines Inc.* v. *Civil Aeronautics Board*, 348 F.2d 349 (1965) (the "split charter" case). The Board found the same conclusion indicated by the legislative history, considering both the Committee reports[8] and floor statements.[9]

The District of Columbia Circuit gave particular attention to the legislative purposes. It concluded that Congress was anxious to stabilize the supplemental carrier industry and provide a sound economic basis for its further development. The court reiterated its earlier conclusion in the "split charter" case that the term "charter trips" did not have a fixed meaning but must be read in light of the statutory objective:

> ". . . a prime concern of Congress was to maintain [the] integrity of the charter concept—to preserve the distinction between group and individually ticketed travel; within these limits it is for the Board to evolve reasonable definitions." 365 F.2d at 949 (Appendix B, p. 33 A), quoting 348 F.2d at 354.

---

[7] E.g., *National Bus Traffic Assn.* v. *United States*, 143 F.Supp. 689 (D.C. N.J. 1956).

[8] The Board summarized its conclusions as follows:

> "In short, the Senate version of the bill as well as the Senate Committee Report make clear that the Senate was dissatisfied with the Board's historic refusal to authorize inclusive tour charters. On the other hand, the House bill contained no reference one way or the other to all-expense tours, and the House Committee Report clearly indicates that this matter was to be left to the Board to determine. The ultimate adoption of the House version strongly supports a construction of the statute in line with the House Committee Report." (JA 343a).

[9] The Board found that these statements were to some extent conflicting and were not dispositive of Congressional intent in light of the Committee reports and overall purposes of Congress. (JA 343a).

The court also dealt with the weight to be accorded the floor statements. It found that these statements must be read in light of the congressional purpose to prohibit individually ticketed services and reflected a natural concern that the carriers not be permitted to avoid the prohibition by indirect means. The court examined the substance of the new services, as defined by their detailed terms and conditions, and found them fully consistent with congressional purposes. In any event, the court found, Committee reports showing an intent to leave the matter to the agency must take precedence over the floor statements to the contrary.

The Second Circuit found the matter capable of determination on the basis of what members of Congress said, making it unnecessary to speculate about Congress' basic objectives, or the abuses it was attempting to correct. Since all-expense tours literally involve "the selling of individual tickets to the general public" (Appendix A, p. 17 A), the court found them to be "individually ticketed" services. And since leading legislators had declared on the floor that the bill excluded "all-expense" tours, the court concluded, without analysis, that the particular type of all-expense tour charter authorized by the Board was prohibited. Consideration of congressional purposes was deemed unnecessary by the court since the floor statements represented a binding "congressional declaration." [10]

In order to rely so heavily upon a literal reading of the floor statements, the court had to find—and it did—

[10] "We therefore reject the argument that the legislators' concern was with abuses growing out of the Board's prior practice of allowing supplemental carriers to perform limited scheduled individually ticketed travel. Regardless of the extent to which there may have been legislative concern based on this prior experience, indeed whether or not the expression of concern was misguided or wholly unwarranted, it was in fact manifested in a congressional declaration binding on both the Board and this court, that was clearly intended to forbid the Board to authorize inclusive tours." (Appendix A, p. 21A).

no conflict between these statements and the Committee reports. Indeed, the court concluded that the reports "seem to support petitioners' view" or are at worst "ambiguous." (Appendix A, p. 23 A). Three cases cited by the D. C. Court *in support of* primary reliance on Committee reports were cited by the court as justifying *its* reliance on floor statements as "authoritative indicators of congressional intent." (Appendix A, p. 23 A).[11]

In finding no difficulty with the Committee reports, the court below had to—and did—ignore significant portions of both reports. Thus the statement of the Senate Committee that all expense tour charters conform to "the traditional concept of charter" and are "a very different sort of service from individually ticketed transportation" was not dealt with. Nor did the court pay any heed to the decision of the House Committee not to "freeze the definition of charter service into law." In giving authoritative weight to floor statements, the court had to—and did—ignore the warnings of knowledgeable judges and observers against "manufactured" legislative history—and the indications of such in this instance.[12]

Finally, in assuming that terms such as "individually ticketed," "general public," and "all expense tour" have fixed, literal and commonly accepted meanings, the court bypassed the real issue before it. Such labels cannot possibly suffice to describe congressional intent without the kind of analysis, such as made by the D. C. Circuit,

---

[11] The cases are: *United States* v. *International Union United Auto, etc., Workers*, 352 U.S. 567, 585 (1950); *Nicholas* v. *Denver & R. G. W. R. Co.*, 195 F.2d 428 (10th Cir. 1952); *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 474 (1920).

[12] The fact that two of the floor statements in the House were identical—word for word—and that powerful pressure groups were at work in opposition to the legislation tends to cast some doubt on the court's view of these statements as spontaneous outpourings of Congressional intent.

of the specific and carefully defined services at issue. Even on conventional charter flights, which Congress clearly intended to authorize, the passengers are often "individually ticketed". They are no less members of the "general public" than passengers on inclusive tour charters. And conventional charters are "in direct competition with the regularly scheduled airlines," who possess charter authority.

The agency saw, as the court below did not, that the possible arrangements for chartering aircraft are infinite. Whether such arrangements constitute a "charter trip" therefore depends upon their substance, not their form or their name.[13] Under these circumstances it would have been extremely difficult for Congress to specify what it meant by a "charter." The Committee Reports show that Congress eventually realized just that and decided to leave the issue to the Board. Unfortunately, the Court below did not realize it. In attempting to deal with charter transportation on the basis of loose terms instead of factual details it stumbled into a pitfall which the Congress, the agency, and a sister circuit were wise enough to avoid.

---

[13] At one extreme "all expense tour charter" could be a subterfuge for individually ticketed service, cloaked by a meaningless tour requirement. On the other hand, it could involve not only the formal requisites of a charter hiring but other features which establish it as *bona fide* group transportation—such as participation in a common sightseeing itinerary, for a sustained period, with the same people. The Board regulation in issue requires that an "inclusive tour" be a round trip lasting at least 7 days and stopping at a minimum of three places other than the point of origin. It must include all hotel accomodations and all necessary surface transportation. The tour price may not be less than 110% of the lowest available fare by scheduled carrier. See Part 378.2(b), JA 416a-417a and JA 1096a. These requirements are actually more rigid than for participation in conventional pro rata charters.

2. The decision below has major significance for the traveling public, the air transportation industry, and the role of the United States in foreign air transportation.

As it now stands, an "inclusive tour charter" between points in the fifty states is lawful; a charter meeting the identical C.A.B. definition but operating between the United States and a foreign point is unlawful. Neither the statute nor legislative history makes any distinction between domestic or foreign "charter trips." The anomaly is solely due to the opposing views of the courts.

This conflict is of major significance. Inclusive tour charters, despite their newness, represent a significant form of public transportation. The Board, adopting its Examiner's conclusions, found that there "are still vast areas for future development" of air transportation (JA 96a). It noted that these charters "will generally attract a class of traveler to air transportation not now using scheduled services" (JA 345a). It agreed with its Examiner that these charters "hold real promise both domestically and internationally as the instrumentality most likely to accomplish a significant expansion of pleasure air travel, the segment of the air travel market offering the greatest potential for exploitation." (JA 140a). C.A.B. records for the short period in which this authority has been in effect show that, despite the damaging effect of the litigation surrounding the Board's awards, the potential is beginning to be tapped. Approximately 600 inclusive tour charters, domestic and international, have been approved by the Board. These represent approximately 100,000 passengers, and over $11 million in air transportation revenues.[14]

Inclusive tour charter authority is also vital to the supplemental air carriers. The Board has found that

[14] Based on a tabulation of inclusive tour charter contracts approved by the C.A.B. through November 1, 1967.

these carriers are "providing a useful public service responsive to a public need" and are "making a valuable contribution to the American air transportation system." (JA 136a). The record before the Board showed, however, that supplemental air carriers are relatively small, that their dependence on military charters has been unduly great (70% of all revenues, JA 80a), and that their economic well being required increased access to civil charter revenues. (Such revenues amounted to but $25 million in 1964 (JA 72a)). The revenue developed thus far in the brief history of inclusive tour charters demonstrates that they can contribute significantly to the economic growth and well being of the supplemental carriers. That contribution however is now stultified by the legal limbo created by the Second Circuit.

The case is also important because it affects the balance which the Board and President have struck between inclusive tour authority for supplemental air carriers and foreign air carriers. Since awarding the authority at issue the Board, with Presidential approval, has been disposed to grant inclusive tour charter authority to foreign charter carriers in order to encourage a favorable climate for foreign operations by U. S. supplemental carriers.[15] If the decision of the court below is left standing the entire international inclusive tour market will be in the hands of foreign carriers, a result obviously contrary to the intent of the President and best interests of the United States.

---

[15] E.g., *Sudflug Suddeutsche Fluggesellshaft,* C.A.B. Order E-24697, January 31, 1967, p. 5; *Caledonian Airways (Prestwick) Ltd.*, C.A.B. Order E-25017, April 12, 1967, p. 5. These awards are final and, pursuant to 49 USC 1486, are not judicially reviewable.

CONCLUSION

For the foregoing reasons petitioners pray that this petition for a writ of certiorari be granted.

Respectfully submitted,

RAYMOND J. RASENBERGER
888 17th Street, N. W.
Washington, D. C. 20006
Counsel for World Airways, Inc. and Purdue Aeronautics Corp.

CLAYTON L. BURWELL
1815 H Street, N. W.
Washington, D. C. 20006
Counsel for Trans International Airlines, Inc.

LEONARD N. BEBCHICK
818 - 18th Street, N. W.
Washington, D. C. 20006
Counsel for Saturn Airways, Inc.

GEORGE BERKOWITZ
233 Broadway
New York, New York
Counsel for Capitol International Airways, Inc.

STEPHEN D. POTTS
910 - 17th Street, N. W.
Washington, D. C. 20006
Counsel for American Flyers, Inc.